Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

27 April 2023 (*)

(Reference for a preliminary ruling – Taxation – Value added tax (VAT) – Directive 2006/112/EC – Taxable transactions – Article 2(1)(a) – Concept of ‘supply of goods for consideration’ – Article 9(1) – Economic activity – Article 14(1) and (2)(a) – Supply of goods – Unlawful consumption of electricity – Principle of neutrality of VAT – Charging the consumer for compensation including the price of the electricity consumed – Regional legislation of a Member State – Taxable person – Sui generis entity mandated by municipalities – Concept of ‘body governed by public law’ – Directive 2006/112/EC – Article 13(1), third subparagraph, and Annex I – Principle of taxability of electricity distribution – Concept of ‘negligible activity’)

In Case C?677/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the vredegerecht te Antwerpen (Magistrates’ Court, Antwerp, Belgium), made by decision of 8 November 2021, received at the Court on 11 November 2021, in the proceedings

Fluvius Antwerpen,

v

MX,

THE COURT (Seventh Chamber),

composed of M.L. Arastey Sahún, President of the Chamber, N. Wahl (Rapporteur) and J. Passer, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Fluvius Antwerpen, by C. Docclo, avocate, and T. Chellingsworth, D. Devroe and B. Gevers, advocaten,

– the Belgian Government, by P. Cottin, J.-C. Halleux and C. Pochet, acting as Agents,

– the European Commission, by J. Jokubauskait? and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2009/162/EU of 22 December 2009 (OJ 2010 L 10, p. 14) ('Directive 2006/112'), read in conjunction with Article 14(1) and (2) of that directive, and also Article 9(1) and Article 13(1) of that directive.

2 The request has been made in proceedings between Fluvius Antwerpen ('Fluvius'), an electricity distribution network operator, and MX, an electricity consumer, concerning the payment of an invoice relating to an unlawful usage of electricity.

Legal context

European Union law

3 Article 2 of Directive 2006/112 provides:

'1. The following transactions shall be subject to [value added tax (VAT)]:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

…'

4 Article 9(1) of that directive provides:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

5 Article 13(1) of that directive provides:

'States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

…

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.'

6 Article 14 of that directive is worded as follows:

'1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.

2. In addition to the transaction referred to in paragraph 1, each of the following shall be

regarded as a supply of goods:

(a) the transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation;

…’

7 Article 15(1) of Directive 2006/112 provides:

‘Electricity, gas, heat, refrigeration and the like shall be treated as tangible property.’

8 Annex I to that directive, entitled ‘List of the activities referred to in the third subparagraph of Article 13(1)’, includes a point 2 concerning ‘supply of water, gas, electricity and thermal energy’.

Belgian law

The VAT Code

9 The first and third paragraphs of Article 6 of the wet tot invoering van de belasting over de toegevoegde waarde (Law establishing the Value Added Tax Code) of 3 July 1969 (*Belgisch Staatsblad*, 17 July 1969, p. 7046), in the version applicable to the facts of the case in the main proceedings (‘the VAT Code’), provide:

‘The State, the Communities and the regions of the Belgian State, the provinces, agglomerations, municipalities and public establishments shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

…

They shall in any event have the status of taxable person for the purposes of [VAT] in respect of the following activities or transactions, in so far as those activities or transactions are not carried out on such a small scale as to be negligible:

…

(2) supply of water, gas, electricity and thermal energy;

…’

10 The first and second paragraphs of Article 9 of the VAT Code are worded as follows:

‘For the purposes of the application of the [VAT Code], goods shall be understood to be tangible property.

The following shall be regarded as tangible property:

(1) electricity, gas, heat and cooling;

…’

11 Article 10 (1) and (2) of the VAT Code is worded as follows:

‘1. “Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.

In particular, this involves making goods available to a person acquiring them under a contract transferring property or declaring rights to property.

2. The following shall also be regarded as a supply of goods:

(a) transfer, by order made by or in the name of a public authority, of the ownership of property against payment of compensation and, more generally, in pursuance of a law, decree, ordinance, decision or administrative regulation;

…’

The Energy Decree

12 The decreet houdende algemene bepalingen betreffende het energiebeleid (Decree laying down general provisions on energy policy) of 8 May 2009 (*Belgisch Staatsblad*, 7 July 2009, p. 46192), as amended by the decreet tot wijziging van het Energiedecreet van 8 mei 2009, wat betreft het voorkomen, detecteren, vaststellen en bestraffen van energiefraude (Decree amending the Decree on energy of 8 May 2009, as regards the prevention, detection, establishment and punishment of energy fraud) of 24 February 2017 (*Belgisch Staatsblad*, 22 March 2017, p. 38694) (‘the Energy Decree’), adopted by the Flemish Government, includes Article 1.1.3, which provides:

‘…

(40)(1) Energy fraud: means any unlawful act by a person, whether active or passive, which involves obtaining an undue advantage. The following shall be regarded as energy fraud:

(a) unauthorised performance of operations on the distribution network or on the local electricity transmission network;

(b) manipulation of the connection or the metering device;

(c) failure to comply with the reporting obligations arising from the application of this Decree, its implementing decisions, the connection regulation, the connection contract or the technical regulation;

…’

13 Under Article 4.1.1 of the Energy Decree, the Vlaamse Regulator van de Elektriciteits- en Gasmarkt (Flemish Electricity and Gas Regulator; ‘the VREG’), which is an independent external agency governed by public law, designates, for a geographically defined area, a legal person responsible for the operation of the electricity or natural gas distribution network in that area.

14 Article 5.1.2 of the Energy Decree provides:

‘…

The relevant network user shall bear the costs incurred by the network operator to undo the energy fraud as defined in Article 1.1.3(40)(1)(a), (b), (c), (d) and (g), the costs of disconnection, the regularisation of the connection or of the metering device, the reconnection, the costs of the unlawfully obtained advantage and interest.

…’

The Energy Decision

15 The besluit van de Vlaamse Regering houdende algemene bepalingen over het energiebeleid (Decision of the Flemish Government laying down general provisions on energy policy) of 19 November 2010 (*Belgisch Staatsblad*, 8 December 2010, p. 74551), as amended by the besluit van de Vlaamse Regering tot wijziging van het Energiebesluit van 19 november 2010, wat betreft het voorkomen, detecteren, vaststellen en bestraffen van energiefraud (Decision of the Flemish Government amending the Energy Decision of 19 November 2010, as regards the prevention, detection, establishment and punishment of energy fraud) of 26 January 2018 (*Belgisch Staatsblad*, 30 March 2018, p. 31178) (‘the Energy Decision’), includes Article 4.1.2, which is worded as follows:

‘1. The unlawfully obtained advantage referred to in Articles 5.1.2 and 5.1.3 of the [Energy Decree] shall be calculated, as appropriate, as the product of one or more of the following:

(1) a lump-sum price;

(2) an estimated volume of consumption, injection or production;

(3) the duration of the energy fraud.

The calculation referred to in subparagraph 1 shall always be indexed on the basis of the consumer price index. To that end, the unlawfully obtained advantage shall be multiplied by the ratio of the consumer price index on 1 January of the year in which the energy fraud was established and the consumer price index on 1 January of the year in which the energy fraud took place.

The unlawfully obtained advantage may relate to one or more of the following:

(1) the costs avoided in the event of misuse of the distribution network or the local electricity transmission network;

(2) the avoided costs of using the distribution network or the local electricity transmission network;

(3) the avoided costs of connection to the distribution network or modification of the connection;

(4) the avoided costs for the energy supplied;

…

2. In the cases referred to in points (1), (2) and (3) of subparagraph (3) of paragraph 1, the calculation shall be based on tariffs for connection to, or use of, the distribution network or the local electricity transmission network, determined in accordance with the applicable tariff method, including taxes, levies and VAT.

The calculation referred to in subparagraph 1 shall be based on the total duration of the energy fraud, the starting point being determined by objective elements established by the network operator.

3. In the case referred to in subparagraphs (3) and (4) of paragraph 1, the amount of energy supplied shall be estimated according to the estimation method provided for in the technical

regulations.

…

The price used to calculate the electricity or natural gas consumed unlawfully shall be the price of electricity or natural gas in the event of fraud, as approved by the competent regulator and determined in accordance with Article 20(1) of the Law of 29 April 1999 on the organisation of the electricity market or in accordance with Article 15(10)(1) of the Law of 12 April 1965 on the transmission of gas and other products by pipeline, including taxes, levies and VAT.

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 In the Flemish Region (Belgium), the supply of energy to individuals is governed by the Energy Decree, which is itself supplemented and implemented by the Energy Decision.

17 Acting pursuant to Article 4.1.1 of the Energy Decree, the VREG designated Fluvius as the legal person responsible for the operation of the electricity or natural gas distribution network in the territory of a group of municipalities in that region.

18 Fluvius is an inter-municipal cooperation structure established in the form of an association, of which 38 Flemish municipalities are members. It is defined in Article 2 of its articles of association as a legal person governed by public law with a *sui generis* status.

19 Fluvius is entrusted by some of its member municipalities with the implementation of one or more of their responsibilities falling within one or more areas of activity, in this case energy distribution. Its board of directors is to be composed of councillors and aldermen of its member municipalities. As distribution network operator, it is, inter alia, responsible for transporting electricity to individual installations and is responsible for the installation, commissioning and reading of meters.

20 During the period from 7 May 2017 to 7 August 2019, MX, an individual, consumed electricity illegally.

21 Having established that unlawful consumption, Fluvius, on the basis of a comparison of the meter readings from the place of consumption at the beginning and end of that period, issued an invoice in the amount of EUR 813.41, including VAT of EUR 131.45, together with default interest and statutory interest. MX did not pay that invoice.

22 Accordingly, on 22 June 2021, Fluvius brought proceedings against MX for payment of that invoice before the vredegerecht te Antwerpen (Magistrates’ Court, Antwerp, Belgium), the referring court. That court ordered MX, by the order for reference, to compensate Fluvius for the cost of ‘unlawfully taken energy’. It expresses doubts, however, as to whether VAT is chargeable in circumstances such as those of the case before it.

23 In that regard, it observes that, before 1 May 2018, no legislative provision dealt explicitly with the question whether VAT could be charged on the compensation payable by the person who unlawfully used energy. Since that date, the combined provisions of Article 1.1.3(40)(1) and Article 5.1.2 of the Energy Decree and Article 4.1.2 of the Energy Decision have corrected that lacuna, since the usage of electricity on the network without the conclusion of a commercial contract and without notification to the distribution network operator may be regarded as an unlawful act, whether active or passive, associated with obtaining an unlawful advantage within the meaning of Article 1.1.3(40)(1) of the Energy Decree. In addition, Article 4.1.2(3) of the Energy Decision lays

down the detailed rules governing how the compensation representing the unlawfully obtained advantage is to be determined and providing that that compensation is to include taxes, levies and VAT.

24 The referring court is uncertain, however, whether those provisions are compatible with a number of articles of Directive 2006/112.

25 In those circumstances, the vredegerecht te Antwerpen (Magistrates' Court, Antwerp) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 2(1)(a), read in conjunction with Article 14(1) of [Directive 2006/112], be interpreted as meaning that the unlawful usage of energy is a supply of goods, being the transfer of the right to dispose of tangible property as owner?

(2) If not, must Article 14(2)(a) of [Directive 2006/112] be interpreted as meaning that the unlawful usage of energy is a supply of goods, being a transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation?

(3) Must Article 9(1) of [Directive 2006/112] be interpreted as meaning that, if [Fluvius] is entitled to compensation for unlawfully [taken] energy, it is to be regarded as a taxable person since the unlawful usage is the result of an "economic activity" of [Fluvius], namely the exploitation of tangible property for the purposes of obtaining income therefrom on a continuing basis?

(4) If Article 9(1) of [Directive 2006/112] must be interpreted as meaning that the unlawful usage of energy constitutes an economic activity, must the first paragraph of Article 13(1) of [Directive 2006/112] then be interpreted as meaning that [Fluvius] is a public authority and, if so, must the third paragraph of Article 13(1) then be interpreted as meaning that the unlawful usage of energy is the result of an activity of [Fluvius] that is not carried out on such a small scale as to be negligible?'

Consideration of the questions referred

The first and second questions referred

26 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2(1)(a) of Directive 2006/112, read in conjunction with Article 14(1) or Article 14(2)(a) of that directive, must be interpreted as meaning that the supply of electricity by a distribution network operator, even if involuntary and as a result of unlawful conduct on the part of a third party, constitutes a supply of goods within the meaning of either of those two provisions.

27 As a preliminary point, it should be borne in mind that Article 2(1)(a) of Directive 2006/112, relating to taxable transactions, provides that, inter alia, the supply of goods for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT.

28 As regards the activity at issue in the main proceedings, namely the supply of electricity, even if it is involuntary and the result of the illegal action taken by a third party, it should be noted at the outset, first, that, according to settled case-law, as regards the levying of VAT, the principle of fiscal neutrality precludes any general distinction between lawful and unlawful transactions (judgment of 10 November 2011, *The Rank Group*, C?259/10 and C?260/10, EU:C:2011:719, paragraph 45 and the case-law cited), since the VAT system is aimed at taxing the end consumer

of goods or services (judgment of 1 July 2021, *Tribunal Económico Administrativo Regional de Galicia*, C?521/19, EU:C:2021:527, paragraph 31 and the case-law cited) where those goods or services were supplied as part of taxable transactions pursuant to Directive 2006/112.

29 Second, bearing in mind that Article 15(1) of that directive treats electricity as tangible property, it must be stated that the supply of such goods within the meaning of Article 2(1)(a) of that directive must be effected 'for consideration', which implies that there is a direct link between the supply of goods and the consideration actually received by the taxable person. Such a direct link is established where there is a legal relationship between the provider of the goods and the recipient thereof pursuant to which there is reciprocal performance, the remuneration received by the party initiating that transaction constituting the actual consideration for the goods supplied to the recipient (see, to that effect, judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 36).

30 In the present case, the direct link between the unlawfully consumed electricity and the sum claimed in return by Fluvius is clear from the information provided by the referring court, since MX used the electricity at his residential address and Fluvius was able to establish the quantity thus used by drawing up a statement of the electricity consumption between 7 May 2017 and 7 August 2019 by reading the meter at that address. The amount corresponding to the cost of the electricity unlawfully consumed was thus included in the sum claimed from MX.

31 Furthermore, the criterion relating to the existence of a legal relationship in the context of which the supply of goods takes place and the consideration for it must be interpreted in the light of the case-law referred to in paragraph 28 of the present judgment, taking into account all of the circumstances of each individual case in such a way that the principle of fiscal neutrality is not disregarded. In that context, that criterion must be given a broad meaning.

32 Moreover, first, as pointed out by Fluvius, even if the supply of electricity has occurred without the conclusion of a contract, the relationship between the clandestine consumer and the electricity distribution network operator is governed by the connection regulation applicable to the facts in the main proceedings, which defines the concept of 'unlawful usage' and provides for the resulting consumption to be attributed by the distribution network operator to the person who engaged in that usage. Second, as stated in paragraph 23 of the present judgment, both the Energy Decree and the Energy Decision govern cases of usage of electricity without the conclusion of a commercial contract and without prior notification to the distribution network operator, and determine the detailed rules for determining the compensation representing the advantage unlawfully obtained by that consumer.

33 Thus, a supply of goods with such characteristics, which it is for the referring court to verify, equates to a supply of goods for consideration within the meaning of Article 2(1)(a) of Directive 2006/112.

34 It remains to be determined whether such a supply of goods may be defined as the transfer of the right to dispose of tangible property within the meaning of Article 14(1) of that directive or whether it constitutes a transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation, in accordance with Article 14(2)(a) of that directive.

35 In that regard, it should be recalled that Article 14(1) of Directive 2006/112 does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law, but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he or she were its owner (judgment of 25 February 2021, *Gmina Wroc?aw (Transformation of the right of usufruct)*, C?604/19, EU:C:2021:132, paragraph

52 and the case-law cited).

36 That concept is objective in nature and applies without regard to the purpose or results of the transactions concerned (judgment of 15 May 2019, *Vega International Car Transport and Logistic*, C?235/18, EU:C:2019:412, paragraph 28).

37 In the present case, it is apparent from the order for reference that, during the period from 7 May 2017 to 7 August 2019, that is to say, for over two years, Fluvius supplied MX with electricity. It therefore necessarily assumed that it was supplying a customer and, at the same time, MX behaved as such towards Fluvius and acted ‘as if he were its owner’, that is to say, he used the electricity supplied by Fluvius. As correctly pointed out by the Belgian Government, the properties of electricity mean that the usage from the distribution network coincides with consumption of the goods and that that consumption of the goods equates not only to usage of those goods but also to disposal thereof, which is the ultimate attribute of the right to property. A supply of goods in circumstances such as those in the main proceedings must therefore be regarded as the transfer of the right to dispose of tangible property within the meaning of Article 14(1) of Directive 2006/112.

38 Since it is apparent from the wording and scheme of Article 14 of that directive that paragraph 2 of that article constitutes, in relation to the general definition set out in paragraph 1 thereof, a *lex specialis*, the conditions for the application of which are independent of those of paragraph 1 (judgment of 25 February 2021, *Gmina Wroc?aw (Transformation of the right of usufruct)*, C?604/19, EU:C:2021:132, paragraph 55 and the case-law cited), the finding in the preceding paragraph of the present judgment precludes the application of Article 14(2)(a) of that directive to the case in the main proceedings.

39 In the light of the foregoing, the answer to the first and second questions referred is that Article 2(1)(a) of Directive 2006/112, read in conjunction with Article 14(1) of that directive, must be interpreted as meaning that the supply of electricity by a distribution network operator, even if involuntary and the result of unlawful conduct on the part of a third party, constitutes a supply of goods for consideration entailing the transfer of the right to dispose of tangible property.

The third and fourth questions referred

40 By its third and fourth questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 9(1) of Directive 2006/112 must be interpreted as meaning that the supply of electricity by a distribution network operator, even if involuntary and the result of unlawful conduct on the part of a third party, constitutes an economic activity and, if so, whether, first, an operator engaging in such an activity, like Fluvius, thus acts as a public authority within the meaning of Article 13(1) of that directive and, second, if so, whether that provision must be interpreted as meaning that such usage relates to activity on the part of that operator that is not carried out on such a small scale as to be negligible.

41 It should be noted that the analysis of the wording of Article 9(1) of Directive 2006/112, results in, first, the scope of the concept of ‘economic activity’ being highlighted, and, second, the objective nature of that concept being clarified, in the sense that the activity is considered per se and without regard to its purpose or results (see, to that effect, judgment of 25 February 2021, *Gmina Wroc?aw (Transformation of the right of usufruct)*, C?604/19, EU:C:2021:132, paragraph 69 and the case-law cited).

42 An activity is thus, in general, classified as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the transaction (judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 47 and the case-law cited).

43 In the present case, the referring court does not ask the Court about the classification of the activity of an operator such as Fluvius who acts in its capacity as a distribution network operator, which activity clearly meets the criteria set out in the preceding paragraph of the present judgment. This point is confirmed, moreover, by the very wording of the third subparagraph of Article 13(1) of Directive 2006/112, read in conjunction with Annex I to that directive, which provides that the distribution of electricity is, in principle, subject to VAT even where it is carried out by a body governed by public law acting as a public authority. In highlighting the criterion of the operator's intention to obtain income on a continuing basis, the referring court draws the Court's attention to how MX's unlawful usage of electricity in the present case was, first, unwanted by the operator and, second, an isolated case.

44 As is clear from the Court's case-law, in order to determine whether a given transaction falls within the scope of an economic activity, it is necessary to analyse all the circumstances in which it is carried out (see, to that effect, judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 48 and the case-law cited).

45 In that regard, it is apparent from the file in the Court's possession, first, that Fluvius is required, within the jurisdiction of the municipalities participating in the inter-municipal cooperation structure which it constitutes, to supply any person who no longer has a contract with a commercial distributor and who has given prior notice thereof to a body such as Fluvius. Consequently, it appears that, in so far as it proves necessary, Fluvius may be led to assume directly the role of electricity supplier, with the result that such an activity is not marginal and, moreover, far from being unconnected with its activity as an electricity distribution network operator, cannot be severed from its tasks considered as a whole.

46 Second, both the Flemish Region, through Article 1.1.3(40)(1) and Article 5.1.2 of the Energy Decree, and through Article 4.1.2 of the Energy Decision, and Fluvius itself, through the connection regulation applicable to the facts in question, have made provision for cases of unlawful usage of energy, in particular electricity, and regulated the resulting administrative and financial consequences, which precludes the phenomenon from being regarded as ad hoc and isolated, since it has been sufficiently present and recurring as to justify legislative action.

47 Third, the risk of losses following a theft, in this case the risk of having to bear at its own expense the quantities of electricity lost as a result of the unlawful usage thereof by a third party, constitutes a typical commercial risk of an economic activity, in this case that of an operator of an electricity distribution network.

48 Consequently, subject to a verification of the abovementioned facts by the referring court, it must be held that Article 9(1) of Directive 2006/112 must be interpreted as meaning that the supply of electricity by a distribution network operator, even if involuntary and the result of unlawful conduct on the part of a third party, constitutes an economic activity of that operator inasmuch as it gives rise to a risk inherent in its activity as a distribution network operator.

49 Even if it were accepted, first, that Fluvius is a body governed by public law within the meaning of Article 13(1) of Directive 2006/112 and, second, that it acted as a public authority in supplying electricity to MX, that supply of goods should, in principle, be subject to VAT (see paragraph 43 of the present judgment), unless Fluvius's activity in that regard can be regarded as

being carried out on such a small scale as to be negligible.

50 Subject to the assessment to be made by the referring court, since the national court alone has jurisdiction to interpret the law of the Member State concerned, it should be borne in mind that Fluvius's articles of association classify it as a legal person governed by public law with a *sui generis* status, as confirmed by the Belgian Government in its observations. Furthermore, as indicated in paragraph 19 of the present judgment, Fluvius, as an inter-municipal cooperation structure, is administered by the elected representatives of the municipalities participating in that cooperation and its tasks are those of those municipalities, carried out jointly. Thus, in the light of those documents before the Court, notwithstanding the designation 'association charged with a mission' (*Opdrachthoudende vereniging*), a body such as Fluvius appears to fall within the definition of a body governed by public law within the meaning of Article 13(1) of Directive 2006/112.

51 Furthermore, Fluvius's obligation referred to in paragraph 45 of the present judgment appears to correspond to a public service obligation, in so far as it seeks to prevent persons without a commercial contract with an energy supplier, for example for reasons of economic insecurity, from being deprived of an electricity supply.

52 Therefore, it is necessary to determine what may be services carried out on such as small scale as to be negligible within the meaning of the third subparagraph of Article 13(1) of Directive 2006/112 and whether the supply of electricity by an energy distribution network operator, in the context of an unlawful usage of electricity, may come within the scope thereof.

53 By providing, in that provision, that the activities listed in Annex I to that directive, such as the distribution of electricity, are, in any event, unless they are carried out on such a small scale as to be negligible, to be subject to VAT, even if they are carried out by a body governed by public law acting as a public authority, the EU legislature sought to avoid certain distortions of competition (see, to that effect, judgment of 16 July 2009, *Commission* v *Ireland*, C?554/07, EU:C:2009:464, paragraphs 72 and 73 and the case-law cited).

54 It follows that the concept of 'negligible activity' constitutes a derogation from the general rule that any activity of an economic nature is subject to VAT. Therefore, that concept must be interpreted strictly (see, to that effect, judgment of 25 February 2021, *Gmina Wroc?aw (Transformation of the right of usufruct)*, C?604/19, EU:C:2021:132, paragraph 77 and the case-law cited).

55 As a result, that activity is not subject to VAT only if it is possible to regard the activity referred to in Annex I to Directive 2006/112, carried out by a body governed by public law acting as a public authority, as being of such minimal scale in space or time and, consequently, of such a slight economic impact that the distortions of competition likely to result are liable to be, if not nil, at the very least insignificant.

56 In the light of the considerations set out in paragraphs 45 and 46 of the present judgment, it appears that that is not the case with the supply of electricity by a distribution network operator such as Fluvius, including in the context of an unlawful usage of electricity, since both the Flemish Region and Fluvius were led to make provision for the administrative and financial consequences of unlawful usages, which is indicative of their being significant. Consequently, a supply of electricity such as that at issue in the main proceedings does not form part of a negligible activity and must therefore be subject to VAT.

57 In the light of the foregoing, the answer to the third and fourth questions referred is that Article 9(1) of Directive 2006/112 must be interpreted as meaning that the supply of electricity by a

distribution network operator, even if involuntary and the result of unlawful conduct on the part of a third party, constitutes an economic activity of that operator inasmuch as it gives rise to a risk inherent in its activity as an electricity distribution network operator. Where that economic activity is carried out by a body governed by public law acting as a public authority, such an activity, referred to in Annex I to that directive, can be regarded as being carried out on such a small scale as to be negligible within the meaning of the third subparagraph of Article 13(1) of that directive only if it is of such minimal scale in space or time and, consequently, of such a slight economic impact that the distortions of competition likely to result are liable to be, if not nil, at the very least insignificant.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

1. **Article 2(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/162/EU of 22 December 2009, read in conjunction with Article 14(1) of that directive,**

must be interpreted as meaning that the supply of electricity by a distribution network operator, even if involuntary and the result of unlawful conduct on the part of a third party, constitutes a supply of goods for consideration entailing the transfer of the right to dispose of tangible property.

2. **Article 9(1) of Directive 2006/112, as amended by Directive 2009/162,**

must be interpreted as meaning that the supply of electricity by a distribution network operator, even if involuntary and the result of unlawful conduct on the part of a third party, constitutes an economic activity of that operator inasmuch as it gives rise to a risk inherent in its activity as an electricity distribution network operator. Where that economic activity is carried out by a body governed by public law acting as a public authority, such an activity, referred to in Annex I to that directive, can be regarded as being carried out on such a small scale as to be negligible within the meaning of the third subparagraph of Article 13(1) of that directive only if it is of such minimal scale in space or time and, consequently, of such a slight economic impact that the distortions of competition likely to result are liable to be, if not nil, at the very least insignificant.

[Signatures]

* Language of the case: Dutch.